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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH AGARPAO,

Defendant and Appellant.

B172152

(Los Angeles County
Super. Ct. No. PA042882)

APPEAL from a judgment of the Superior Court of Los Angeles County, Hiroshi Fujisaki, Judge. Affirmed.

Jennevee H. De Guzman, under appointment by the Court of Appeal, for
Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney
General, Pamela C. Hamanaka, Senior Assistant Attorney General, Marc J. Nolan,
Supervising Deputy Attorney General, and A. Scott Hayward, Deputy Attorney General,
for Plaintiff and Respondent.

Defendant and appellant Joseph Agarpao appeals from the judgment entered following a jury trial that resulted in his convictions for assault with a deadly weapon or by means likely to produce great bodily injury. Agarpao was sentenced to a prison term of three years.

Agarpao contends the trial court erred by admitting the testimony of a witness. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*

a. *People's evidence.*

Viewed in accordance with the usual rules governing appellate review (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11), the evidence relevant to the issues on appeal established the following. Rodolfo Aquino and his wife Lillian lived in the same apartment complex as appellant Agarpao.¹ Lillian was the apartment manager. Apartment residents had petitioned for Lillian's removal as manager, and Agarpao had signed the petition. On December 13, 2002, at approximately 8:30 p.m., Rodolfo stepped out of his apartment, looking for Lillian. As he was calling for her, Agarpao, who had been drinking, approached him and repeatedly said, "Do you have a problem, Boy?"² Agarpao and Rodolfo had not argued previously. When Agarpao was within two feet of Rodolfo, Rodolfo stated that Agarpao was the one with the problem. The two men exchanged words. Lillian arrived and attempted to mediate, telling Agarpao to go home and go to sleep.

Agarpao became angrier, and threw a punch at Rodolfo. Rodolfo dodged the punch, which hit Lillian instead. Rodolfo did not return the punch. Agarpao pulled an ice pick from his pocket and pushed Lillian. Rodolfo's mother, Beatriz Aquino, had

¹ For ease of reference, we will hereinafter refer to the Aquinos by their first names.

² Rodolfo testified that "Boy" was his nickname.

come out of her apartment upon hearing the commotion. Lillian and Beatriz lost their balance and fell onto Rodolfo, causing the group to fall to the ground. Agarpao began stabbing Lillian and Rodolfo with the ice pick, wounding Lillian twice in the arm and wounding Rodolfo in the left armpit and chest, puncturing through his thick leather jacket. Beatriz and Lillian managed to pull Rodolfo into Beatriz's nearby apartment. Agarpao followed and attempted to force his way into the apartment.

Paolo Capitulo resided at the same apartment complex. At approximately 8:45 p.m., just after Agarpao's attack on the Aquinos, Capitulo was in his apartment asleep. Agarpao opened Capitulo's door and asked where Capitulo's mother was. Capitulo stated she was not at home. Agarpao stated, "Your mom is a bitch. Do you want to fight with me? Are you going to fight with me? Your mom is a bitch." Agarpao then departed. When police arrived, Agarpao fled.

During an interview with a detective, Agarpao stated that he had been drunk at the time of the incident, did not "remember much," and had been told by a friend that he had an ice pick.

b. *Defense evidence.*

Agarpao presented a self-defense theory. Eduardo Cates, who lived in the same apartment complex, testified that Agarpao and Rodolfo had been good friends, but had a falling out as a result of gossip. On the evening of the incident, Cates was watching television at the apartment complex with Agarpao and three other people. Agarpao was drinking hard liquor. The group was dining on Philippine barbecue, served on bamboo sticks. Cates and Agarpao went to the apartment parking lot to retrieve a gift for Agarpao's child from Cates's car. Rodolfo and Lillian pulled up in their car. Rodolfo, who appeared angry, shouted "you mother fucker" at Agarpao and Cates. Agarpao did not respond.

Rodolfo and Lillian headed toward their apartment. Agarpao and Cates followed because this was the only route to their respective apartments. Rodolfo asked Agarpao what his "problem" was. Agarpao did not respond. The two men became engaged in a

fistfight, during which Agarpao only defended himself. During the fight, Agarpao was still holding his bamboo barbeque stick. When the fight ended, Agarpao went straight to his apartment. According to a defense investigator's report, Cates stated during an interview that he had not seen the fight. Cates denied making such a statement to the defense investigator, and affirmed that he had witnessed the incident.

2. Procedure.

Trial was by jury. Agarpao was convicted of two counts of assault with a deadly weapon or by means likely to produce great bodily injury. (Pen. Code, § 245, subd. (a)(1).)³ Agarpao was sentenced to a term of three years in prison. The trial court also imposed restitution fines and assessed a suspended parole revocation fine. Agarpao appeals.

DISCUSSION

1. Paolo Capitulo's testimony was properly admitted.

Agarpao objected to Capitulo's testimony as irrelevant and unduly prejudicial. After an Evidence Code section 402 hearing, the trial court ruled Capitulo's testimony admissible because it provided circumstantial evidence of Agarpao's state of mind. Agarpao contends the trial court erred. He urges Capitulo's testimony was inflammatory and should have been excluded under Evidence Code section 352. Admission of the testimony, he posits, violated his due process rights. We are unpersuaded.

Evidence that a defendant committed misconduct other than that currently charged is inadmissible to prove he or she has a bad character or a disposition to commit the charged crime. (Evid. Code, § 1101, subd. (a); *People v. Kipp* (1998) 18 Cal.4th 349, 369; *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1017.) However, such evidence is admissible if it is relevant to prove, among other things, intent, knowledge, identity, or the existence of a common design or plan. (Evid. Code, § 1101, subd. (b); *People v. Catlin* (2001) 26 Cal.4th 81, 145-146; *People v. Ewoldt* (1994) 7 Cal.4th 380, 402;

³ All further undesignated statutory references are to the Penal Code.

People v. Kipp, supra, at p. 369.) “ ‘The admissibility of other crimes evidence depends on (1) the materiality of the facts sought to be proved, (2) the tendency of the uncharged crimes to prove those facts, and (3) the existence of any rule or policy requiring exclusion of the evidence.’ [Citation.]” (*People v. Steele* (2002) 27 Cal.4th 1230, 1243.) The least degree of similarity between the crimes is needed to prove intent. (*Id.* at p. 1244; *People v. Ewoldt, supra*, at p. 402.)

Even if the evidence of other crimes is relevant to prove matters other than the defendant’s character or disposition, it is inadmissible unless its probative value is substantial and is not outweighed by the probability that its admission would create a serious danger of undue prejudice, of confusing the issues, or of misleading the jury. (*People v. Kipp, supra*, 18 Cal.4th at p. 371; *People v. Ewoldt, supra*, 7 Cal.4th at p. 404; *People v. Scheer, supra*, 68 Cal.App.4th at p. 1018.) Because evidence relating to uncharged misconduct may be highly prejudicial, its admission requires careful analysis. (*People v. Ewoldt, supra*, at p. 404.)

The admission of evidence of a prior offense, and the evaluation of prejudice under Evidence Code section 352, is entrusted to the sound discretion of the trial court and its ruling will not be overturned except upon a finding of manifest abuse, i.e., a conclusion that the decision was “palpably arbitrary, capricious and patently absurd.” (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314; *People v. Waidla* (2000) 22 Cal.4th 690, 724; *People v. Kipp, supra*, at p. 369.)

The trial court did not err by admitting Capitulo’s testimony. To prove the charged crimes of assault with a deadly weapon or by means likely to produce great bodily injury, the People had to rebut Agarpao’s contention that he was simply defending himself against an unprovoked attack by Rodulfo. The jury was instructed that, “It is lawful for a person who is being assaulted to defend [himself] from attack if, as a reasonable person, [he] has grounds for believing and does believe that bodily injury is about to be inflicted upon [him]. In doing so, that person may use all force and means which [he] believes to be reasonably necessary” The fact that Agarpao attempted to

antagonize another person within minutes of the attack on the Aquinos tended to show that he was belligerent and intent on instigating a fight, undercutting the theory that he was not the aggressor and had merely attempted to defend himself. The evidence was therefore properly admitted to show facts other than a criminal disposition under Evidence Code section 1101, subdivision (b).

Further, the evidence was probative on this point. Factors affecting the probative value of evidence of uncharged misconduct include the similarity of the charged and uncharged conduct; the extent to which the source of the evidence is independent of the charged offense; and the amount of time between the uncharged and charged acts. (*People v. Ewoldt, supra*, 7 Cal.4th at pp. 404-405; *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1210-1212.) Here, the charged and uncharged acts were highly similar: in each instance, without provocation, Agarpao made hostile statements in an apparent effort to start a fight. Agarpao's verbal challenge to Capitulo occurred within minutes after his attack on the Aquinos. Capitulo was an independent source: he was not a victim in the attack on the Aquinos. (See *People v. Zepeda, supra*, at p. 1212.)

Nor was the evidence unduly prejudicial. Evidence is substantially more prejudicial than probative if it poses an intolerable risk to the fairness of the proceedings or the reliability of the outcome (*People v. Waidla, supra*, at p. 724), and uniquely tends to evoke an emotional bias against the defendant without regard to relevance. (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 650.) The admission of relevant evidence will not offend due process "unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair." (*People v. Falsetta* (1999) 21 Cal.4th 903, 913.) Among the factors a trial court may consider when determining whether uncharged evidence is more prejudicial than probative are whether the uncharged acts resulted in criminal convictions, and whether the evidence of the uncharged acts is stronger or more inflammatory than the evidence of the charged offenses. (*People v. Ewoldt, supra*, 7 Cal.4th at p. 405; *People v. Zepeda, supra*, 87 Cal.App.4th at p. 1211.) In the instant matter, Agarpao's statements to Capitulo were less serious and less inflammatory than his

attack on the Aquinos. Given the circumstances, there was no chance the jury might have been inclined to punish Agarpao for his challenge to Capitulo. (See *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 405.) That the evidence was damaging to Agarpao's defense did not make it prejudicial within the meaning of Evidence Code section 352. "The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence." [Citations.]” (*People v. Zapien* (1993) 4 Cal.4th 929, 958.)

Relying on *People v. Balcom* (1994) 7 Cal.4th 414, Agarpao argues that Capitulo's testimony lacked probative value because it was cumulative. He points out that four witnesses -- Rodulfo, Lillian, Beatriz, and eyewitness Roselyan Yadao -- testified Agarpao was the aggressor. However, Agarpao ignores the fact that his witness Cates testified to the contrary. Simply because a greater number of witnesses testified that he was the aggressor did not mean the issue was undisputed. "[E]vidence does not become irrelevant solely because it is cumulative of other evidence.” (*People v. Smithey* (1999) 20 Cal.4th 936, 975.) We conclude the trial court did not abuse its discretion by finding the evidence was not barred by Evidence Code section 352.

Finally, even assuming *arguendo* the testimony should have been excluded, any error in its admission was harmless. The erroneous admission of evidence of uncharged misconduct is evaluated under the *Watson*⁴ test. (*People v. Welch* (1999) 20 Cal.4th 701, 749-750; *People v. Whitson* (1998) 17 Cal.4th 229, 251; *People v. Felix* (1993) 14 Cal.App.4th 997, 1007-1008.) Here, Rodulfo, Lillian, and Beatriz all testified that Agarpao was the aggressor and stabbed Rodulfo and Lillian with an ice pick. A fourth, neutral eyewitness, Yadao, corroborated this testimony. The evidence showed the weapon punctured Rodulfo's leather jacket, a state of affairs inconsistent with Agarpao's theory that the injuries were inflicted inadvertently with a bamboo barbecue skewer. Cates's testimony -- that Rodulfo was the aggressor and Agarpao acted in self-defense --

⁴ *People v. Watson* (1956) 46 Cal.2d 818, 836.)

was seriously undercut by the fact a defense investigator reported Cates stated he did not see the fight. Under these circumstances, there is no reasonable probability the jury would have rendered a more favorable result for Agarpao even if Capitulo's testimony had been excluded.

DISPOSITION

The judgment is affirmed.

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ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.